IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 8924 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

DINESH HIMAT CHHARA

Versus

COMMISSIONER OF POLICE

Appearance:

MS DR KACHHAVAH for Petitioner

MR UR BHATT ADDL.GOVERNMENT PLEADER

for Respondent No. 1, 2, 3

CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 19/03/98

ORAL JUDGEMENT

By this application under Art. 226 of the Constitution of India, the petitioner who is detenu, calls in question the legality and validity of the order of detention dt. 13/11/1997 passed by the Police Commissioner for the City of Ahmedabad, invoking the powers under Sec.3 of the Gujarat Prevention of Anti-Social Activities Act (for short 'the Act'), consequent upon which the petitioner has been arrested and at present kept under detention.

2. In order to appreciate the rival contentions, the facts which led the petitioner to prefer this application

may, in brief, be stated. Certain offences were being committed. With the result, the people were feeling insecured. Many offences being committed, were not for one or another reason registered with the Police Stations. The Police Commissioner, having come to know studied the situation. He found that the petitioner was disturbing the public order by his nefarious activities. He could, perusing the records of the different Police Stations, know that two complaints were lodged against the petitioner with Madhupura Police Station and Gandhinagar, Sector No.7, Police Station. As alleged in the complaint lodged with Madhavpura Police Station, the petitioner was alleged to have committed the offence of theft punishable under Sec.379 read with Sec. 114 of I.P.Code. He has committed the theft of Video Camera, the value of which was about Rs.26,500/-. In another complaint with Gandhinagar, Sector No.7 Police Station, what is alleged is that the petitioner has committed the theft of silver as well as golden ornaments to the tune of Rs.2,21,000/-. The Police Commissioner could also know that many other offences committed by the petitioner had gone unnoticed or because of the fear of violence, no one was ready to come forward to give statement against the petitioner. The Police Commissioner also was shocked to know that the petitioner was terrorising the people and making the people to bend his way so as to carry out his illegal activities. The Police Commissioner was also then satisfied that the petitioner was a head-strong person i.e. tartar and terrorising the people, he was extorting money, causing injuries to the persons and/or causing damage to the properties. His hellish and infernal activities disturbing public order were going berserk. No one was, therefore, ready to come forward and state against the petitioner. After great persuation and when assurance was given that the facts about them disclosing their identity would be kept secret, some of the witnesses have under a great tension stated against the petitioner. The Police Commissioner was then satisfied that the criminal activities and anti-social activities of the petitioner disturbing public order were going berserk and the same was required to be checked at the earliest. However he found that any action under general law would be meaningless and the same would be a futile exercise, because under the said law, sounding dull, it was not possible to curb the petitioner's activities. The only way out was to pass the impugned order, consequent upon which the order came to be passed. The petitioner was then arrested and at present is kept under detention.

3. The petitioner has challenged the order on

different grounds but at the time of hearing, learned advocate representing the petitioner tapered off his submission, confining to only point namely exercise of discretion under Sec. 9(2) of the Act. According to her, the authority passing the detention order, without applying the mind, mechanically took the decision not to disclose the particulars about the witnesses. For want of those particulars, the petitioner's right to make effective representation was prejudiced. The order on that count was, therefore, bad in law.

4. Mr. U.R.Bhatt, learned APP representing the State has vehemently refuted the allegation covered under the submission. According to him, the Commissioner of Police, passing the order of detention, was all the while careful and he personally studied all the papers and took into consideration all the relevant factors and reached the conclusion not to disclose certain particulars in public interest namely to protect the safety of the witness and for that purpose, the privilege was required to be exercised. When accordingly the privilege is exercised, no fault can be found with the detaining authority. The application was, therefore, required to be dismissed. As both have confined to the only point of exercise of privilege, I will deal with the same, without dwelling upon other points.

5. It would be better if the law about the non-disclosure of certain facts is elucidated. Reading Article 22(5) of the Constitution of India, what becomes clear is that the grounds on which order of detention is passed are required to be communicated to the detenu. The detenu is, therefore, required to be informed not merely factual inference and factual material which led to inference namely not to disclose certain facts but also the sources from which the factual material is gathered. The disclosure of sources can enable the detenu to draw the attention of the detaining authority in the course of his representation to the fact whether the factual material collected from such sources would be relied upon and used against him on the facts and circumstances of the case. Subject to the limitation mentioned in Article 22(6) of the Constitution of India and Section 9(2) of the Act, the detaining authority is of course empowered to withhold such facts and particulars, the disclosure of which he considers to be against the public interest. The privilege of non-disclosure has to be exercised sparingly and in those cases, where public interest dictating non-discosure overrides the public interest requiring disclosure. Hence the detaining authority must be fully satisfied on

the basis of overall study that the apprehension expressed by the informant is honest, genuine and reasonable in the circumstances of the case. With a view to satisfy itself whether the fear of violence and consequential feelings of insecurity or apprehension of a wrong would be done to them at any time by the detenu by those making statement against the detenu is imaginary or fanciful; or an empty excuse or well-founded for disclosing or not disclosing certain facts or particulars of those persons, the authority making the order has to make necessary inquiry applying his mind. What can be deduced from such constitutional as well as legal scheme whereunder obligation to furnish the grounds and the duty to consider whether the disclosure of any facts involved therein is against public interest are both vested in the detaining authority and not in any other. The authority passing the order of detention has to apply his mind and should itself be satisfied to the question whether or not the supply of the relevant particulars and materials would be injurious to the public interest. If the task of recording statements and necessary inquiry is entrusted to others, and if he mechanically endorses or accepts the recommendation of others or subordinate authority in that behalf without applying mind and taking his own decision, the exercise of power would be vitiated as arbitrary. What is further required is that the detaining authority must file his affidavit to satisfy the court that he had sincerely and honestly applied the mind for the bonafide exercise of the powers about disclosure and privilege regarding non-disclosure so that the court can examine rational connection between the ground disclosed or not disclosed in public interest. If no affidavit explaining the exercise of the power is filed, the court can infer against the detaining authority. If the affidavit is filed explaining the exercise of the power, the detenu may challenge the privilege exercised on the ground that the same is vitiated by factual or legal malafides. For my such view, a reference to a decision in the case of Bai Amina, W/o. Ibrahim Abdul Rahim Alla Vs. State of Gujarat and others- 22 G.L.R. 1186 held to be the good law by the Full Bench of this Court in the case of Chandrakant N. Patel Vs. State of Gujrat & Others 35(1) [1994(1)] G.L.R. 761, may be made.

6. In view of such law, the authority passing the detention order has to satisfy the court that it was absolutely necessary in the public interest to suppress the particulars about the witnesses, keeping their safety in mind. No doubt, the affidavit sworn in by Mr. J.R.Rajput, Under Secretary to the Government of Gujarat,

is filed, but conveniently, Under Secretary has abstained from explaining the circumstances which led the detaining authority to exercise the discretion available under Sec.9(2) of the act. It is pertinent to note that the authority passing the order of detention has not preferred to file the affidavit, about his subjective satisfaction which is the condition precedent, although he being the authority passing the detention order can explain well the circumstance which led him to take a particular decision. When in this case, the authority passing the detention order has not filed the affidavit, it can safely be assumed that the authority, simply placing the reliance on the report placed before him, exercised the privilege and withheld the particulars. There is, in fact, no application of mind which is in law is required. Further when the affidavit is not filed, it is difficult to know what materials the detaining authority has considered, what led him to exercise the privilege, and what other factors governing the exercise of his privilege, he considered ? When accordingly no explanation is brought on record, the privilege exercised cannot be said to be consistent with law. It is simply a mechanical exercise of his power. Consequently, it should be held that the subjective satisfaction is vitiated. The order of detention, therefore, cannot be held legal and maintainable. The same has to be quashed and set aside.

6. For the aforesaid reason, this application is allowed. The order of detention dt. 13/11/1997 being unconstitutional and illegal is hereby quashed and set aside and the petitioner is ordered to be set at liberty forth with, if no longer required in any other case. Rule accordingly made absolute.

(ccs)